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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 79

COLORADO RIVER MUNICIPAL WATER DISTRICT, ET AL.,

Petitioners,

vs.

BOARD OF WATER ENGINEERS OF TEXAS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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vs.

BOARD OF WATER ENGINEERS OF TEXAS, ET AL.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

This is a Fourteenth Amendment suit involving property. Both due process and equal protection are involved. Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas, reversing the judgment of the 126th Judicial District Court of Travis County, Texas, in favor of Petitioners, and dismissing the cause.

Opinions Below

The judgment of the District Court is found at R. 34 *et seq.* The opinion of the Supreme Court of Texas is reported at 254 S. W. 2d 369; dissenting opinion at page 374.

Jurisdiction

Petitioners' motion for rehearing was overruled by the Supreme Court of Texas on February 18, 1953. R. 68. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1257 (3).

Federal Questions Presented

I.

Whether or not the act of the Board of Water Engineers of Texas in basing its order on *ex parte* investigation and evidence never presented at a public hearing denies to Petitioners the full, fair and open hearing required by the due process clause of the Fourteenth Amendment.

II.

Whether the subjection of Petitioners' water-bearing lands to regulations limiting the number of wells to be drilled and the quantity of water to be produced while other lands covering the same sub-surface acquifer were left free of such restraints, permits the unlawful drainage and confiscation of the Petitioners' water and deprives Petitioners of their property without due process of law and denies to Petitioners the equal protection of the laws, contrary to the Fourteenth Amendment.

State Statutes Involved

The principal statute involved is Chapter 306, page 559, Acts of the 51st Legislature of Texas, Regular Session, 1949 (codified as Article 7880-3c, Vernon's Texas Civil Statutes). This statute authorizes the creation of underground water conservation districts in Texas. By reference, the procedure prescribed for the creation of water control and improvement districts by Chapter 25, Acts of the 39th Legislature of Texas, Regular Session, 1925, as amended (Article 7880-1/147z Vernon's Texas Civil Statutes), is made applicable to the creation of underground water conservation districts.

The most pertinent of these statutes are:

Section C of Article 7880-3c:

> "No petition for the creation of a District to exercise the powers and functions set forth in Sub-

section B of this Section 3c shall be considered by a Commissioners Court or the Board, as the case may be, unless the area to be included therein is coterminous with an underground water reservoir or subdivision thereof which theretofore has been defined and designated by the Board as an underground water reservoir or subdivision thereof. Such district, in conforming to a defined reservoir or subdivision, may include all or parts of a county or counties, municipal corporations or other political subdivisions, including but not limited to Water Control and Improvement Districts.

"It shall be the duty of the Board from time to time and in any event upon application by petition in the manner provided in Section 10 of the Acts of 1925, Thirty-ninth Legislature, Chapter 25, Page 88, *after notice and hearing* as provided for in Section 15 and Section 21 (as amended), Acts of 1925, Thirty-ninth Legislature, Chapter 25, to designate underground water reservoirs and subdivisions thereof and thereafter as future conditions may require and factual data justify to alter the boundaries thereof; provided, however, such alteration shall not invalidate the creation of any District theretofore created with the powers provided for in this Section 3c."

Article 7880-15:

"The notice of hearing of a petition for the formation of a district shall contain a statement of the nature and purpose thereof, the date and time and place of hearing. The notice shall be prepared with one original and three copies. The County Clerk will retain one copy in his files and deliver the original and two copies to the county sheriff. The sheriff shall post one copy at the court house door fifteen days prior to the date of hearing and shall publish one copy in a newspaper of general circulation in the county

once a week for two consecutive weeks, the first publication thereof to be made at least twenty days prior to the date of hearing. He shall make due return of service thereof with copy and affidavit of publication attached on the original prior to date of hearing."

Section F of Article 7880-3c:

"Any interested person, firm, corporation or association of persons affected by the provisions of this Section 3c or any rules, regulations or orders made or promulgated by a District hereunder or by any act of the Board pursuant hereto and who may be dissatisfied therewith shall have the right to file a suit in a court of competent jurisdiction in any county in the State of Texas in which such District or any part thereof is located if the suit is against a district or its directors and in a court of competent jurisdiction in Travis County, Texas if the suit is against the Board, to test the validity of this Section 3c, and such rules, regulations or orders or any of them or any act of the Board * * *. In all such trials, the burden of proof shall be upon the party complaining of such law, rules, regulations or orders or act of the Board, and such law, rules, regulations or orders or act of the Board so complained of shall be deemed prima-facie valid but the trial shall be *de novo*, and the court shall determine independently all issues of fact and of law with respect to the validity and reasonableness of the law, rules, regulations or orders or acts of the Board complained of. The provisions of this Subsection shall be cumulative of all rights of court action by the affected parties and shall not impair or restrict their right to equitable relief."

Parties

Plaintiffs below, Petitioners here, are: Colorado River Municipal Water District, a State agency and conserva-

tion district created by special act of the Texas Legislature (Chapter 340, Page 655, Acts of 51st Legislature, 1949—See Page 163, *et seq.*, 1952 Pocket Part to Volume 21, Vernon's Texas Civil Statutes, Annotated); the incorporated cities of Big Spring and Odessa; and seven individuals who are ranchers and landowners in Martin County, Texas.

The respondents are: Board of Water Engineers of Texas, the State administrative agency composed of three members having limited jurisdiction over surface and ground waters (See article 7477, *et seq.*, Vernon's Texas Civil Statutes); Martin County Underground Water Conservation District No. 1, which claims to be a district created under Article 7880-3c; and the five individuals who purport to constitute its Board of Directors.

Statement

At issue here is a water supply for the inhabitants of the West Texas cities of Odessa (population 30,000) and Big Spring (population 18,000). These two cities, sixty miles apart, are situated in the arid section of West Texas (average annual rainfall less than twenty inches) where water supply is the most critical problem. The water systems are municipally owned. Big Spring has been obtaining a well supply for its entire population from some small lakes, now dry, and a well field now wholly inadequate and approaching the point of exhaustion. Odessa has been relying upon a depleting well field which is incapable of meeting a rapidly increasing demand. Numerous wells have gone dry and strict rationing of water enforced by penal ordinance has been necessary because at times there has been no water for fire protection and the essential needs of the inhabitants (R. 89-90).

Petitioner Colorado District was created by the Legislature of Texas to provide a substitute supply of water for the diminishing existing supplies of these two cities.

The District wholesales to the cities. The City of Snyder was later added to the District but obtains its water from a different source not here involved.

Underlying the ultimate issue, conflict exists between a small group of Martin County cotton farmers on the one hand and their neighboring ranch owners on the other. In order to obtain a share of the benefits from the underground waters being drained from beneath their lands by the farmer-irrigators, the ranchers executed water leases to the Colorado District covering more than 4,000 acres of land, which authorize the Colorado District to drill wells and produce water for municipal and domestic purposes. A sixty-mile pipe line extending from Big Spring to Odessa via the Martin County well field connects with twenty-three water wells drilled by the Colorado District. The pipe line and wells represent an investment of more than $1,500,000.00.

The farmers organized and control the respondent Martin County District. The five farmer-directors elected by the farmers have adopted purported rules and regulations which require permits before water wells can be drilled within the District, set up spacing rules and limit production to a quantity equal to sixteen inches per annum from the water-producing lands of each well owner, respectively, within the District. This quantity is the amount which, together with an average rainfall of eleven inches during the growing season, is necessary to produce a cotton crop. Applied to the approximately 4700 acres of water leases owned by the Colorado District, it is insufficient to produce the quantity of water needed by Big Spring and Odessa (R. 83, *et seq.*).

The sub-surface water-producing formation in Martin County is a part of a prehistoric river valley. It originates somewhere in the State of New Mexico and extends southeasterly across the lower section of the Staked Plains of Texas, enters Martin County near its northwest corner, extends southeasterly across the county, exists near its

southeast corner into neighboring Glasscock County. Its average width in Martin County is less than two miles. (See Map, Plaintiffs' Exhibit 19, filed with the record.) The water percolates through the formation of sand and gravel but the movement is very slow in natural state.

The reservoir is substantially non-replenishing. The rate of recharge is less than 1% of the average rate of withdrawal at the time of trial. The estimated life of the field is not more than twenty years, based upon the rate of irrigation pumping at the time of trial (R. 609, *et seq.*). Irrigation is being developed at a rapid rate with corresponding increases in withdrawals (R. 516).

The Colorado District's supply facilities in Martin County were not completed at the time of trial but have since been completed and are now serving the two cities. The enforcement of the Martin County District's rules and regulations has been suspended pending this litigation.

The Colorado District has constructed a dam on the Colorado River northeasterly from Big Spring in Borden County. Due to a drought unprecedented in modern history, there is substantially no water in the surface reservoir and the engineers estimate that this source will not be available to Big Spring and Odessa until at least 1956. The present drought indicates a much later date. Meanwhile, the Martin County well field must be the primary source of supply for these two cities. The Colorado District proposes to furnish water from Martin County to Big Spring for a maximum of five years and to Odessa for a maximum of ten years. Thereafter, the Martin County supply will be used only for "peaking" purposes during periods of high consumption in summer time at Odessa (R. 78).

The Texas courts, following the English or common law rule of absolute ownership of percolating waters by the owners of overlying land, approve the doctrine of *Acton* v. *Blundell,* 12 M & W 324, 354, as follows:

> "That the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria,* which cannot become the ground of an action."

Houston and Texas Central Ry. v. *East,* 98 Texas 146, 81 S. W. 279 (1904); *Farb* v. *Theis,* 250 S. W. 290 (Tex. Civ. App. 1923).

Underground Water Conservation Act

The Texas Underground Water Conservation Act was passed in 1949 to prevent "waste", as that term is defined, of underground water through the medium of local autonomous regulatory districts. The first step in creating such a district is the designation by the State Board of Water Engineers of an underground water reservoir or subdivision thereof. If the reservoir or subdivision, as designated, lies wholly within one County, as here, the Board of Water Engineers has no further jurisdiction in the organization or administration of the district (Article 7880-15, 21). The procedure thereafter is by petition to the Commissioners' Court, public notice and hearing, approval of the property taxpaying voters at a "confirmation" election, and the election of a board of five directors by the qualified voters residing within the District.

The Board of Water Engineers is authorized to alter the boundaries of a reservoir or subdivision but it is powerless to change the boundaries of an underground water conservation district which has, before such alteration, been created over the State Board's original designation. The boundaries of the district cannot be changed to conform to the later designation without the consent, and upon the petition, of the owners of new lands added

to the designation by the State Board. This petition is addressed to the directors of the local conservation district. Article 7880-75, 75b; *Zavalla-Dimmit County Improvement District No. 1* v. *Hays,* 137 Tex. 338, 153 S. W. 2d 463; *Grand Lodge* v. *Curry,* 108 S. W. 2d 574 (Tex. Civ. App.).

Therefore, after an underground water conservation district is created, there is no way to force the owner of lands included in a later designated extension of the underground reservoir or subdivision by the State Board to come under the controls and regulations of the local district. Obviously, there is no incentive for the owners of lands later found by the Board of Water Engineers to be within the common reservoir to subject their lands voluntarily to the rules and regulations restricting their drilling operations and production of water to which their neighbor's lands within the District are subject. This weakness in the statute permits the unrestricted production of water from a common reservoir by those whose lands are not within the original designation, thereby permitting drainage of water from those lands in the common reservoir which are within the orginal designation and, perforce, within the boundaries of the underground water conservation district. It is, therefore, highly important that the original designation include the entire reservoir or subdivision.

The statute defines an underground water reservoir and subdivision thereof as follows (Art. 7880-3c-A):

> "(4) 'Underground water reservoir' is a specific subsurface waterbearing reservoir having ascertainable boundaries, and containing underground water capable of being produced from a well at the rate of not less than one hundred and fifty thousand (150,000) gallons a day.
>
> "(5) 'Subdivision of an underground water reservoir' is that definable part of an underground water

reservoir from which withdrawal of waters cannot measurably affect the underground water of any other part of such reservoir, based upon existing conditions and reasonably foreseeable conditions, at the time of the designation or alteration of such subdivision."

Designation by State Board

On December 4, 1950, the Board of Water Engineers was petitioned by the farmers in the irrigated section of Martin County to designate an underground water reservoir or subdivision within the County. The territory desired to be included was described. It was a slightly larger territory than that later designated.

After public notice, a hearing was held before the State Board on January 10, 1951, at its offices in Austin. It lasted two hours and fifty minutes (R. 631-690). The evidence introduced at this hearing was cursory and indeterminate. At the conclusion of the hearing, the attorney for the petitioners requested the Board to "allow us to forward whatever other factual data we may be able to obtain in the next few days concerning the location of wells that have been drilled and submit that for the Board's consideration" (R. 687).

Mr. Guleke, a member of the State Board, made the motion which closed the hearing in the following words (R. 689.):

> "I therefore move that the hearing be continued from day to day pending receival of further technical information which will be made available for the purposes of designating this reservoir subdivision if it exists."

Fifteen days later, on January 25, 1951, Mr. A. P. Rollins, one of the three members of the Board of Water Engineers, addressed a letter to the County Judge of Martin County as follows:

"Reference is made to the work that is being done by this Board in designating an underground water reservoir or subdivision thereof in Martin County as a result of the hearing which was held in this office on January 10, 1951. A study was made of available records of this office, which indicated that we were unable to define and designate the boundaries of said reservoir or subdivision without additional information. Whereupon, Mr. Gordon W. Willis, geologist of this office, was assigned to make a field inspection of the area and obtain additional facts. Mr. Willis has compiled the data collected with the assistance of you, Mr. Ralph Jones, the County Agent, and others in Martin County. However, in order to comply with the law, it is essential that still more factual data be obtained before proper designation can be made." (R. 320-2).

Mr. Guleke, a member of the State Board and witness for respondents, testified at the trial as follows (R. 330-2):

"Q. Now, then, he (Mr. Willis) did get some information about well data that wasn't introduced at the hearing on January 10; is that correct?

"A. Yes.

"Q. Did the Board give consideration to the date he accumulated?

"A. It did.

"Q. Now did you also get some shot hole data that was not introduced at the hearing held January 10?

"A. We did.

"Q. Did the Board rely upon the well data and the shot hole data not so introduced at the January 10th hearing?

"A. It did. It relied on all pertinent information.

"Q. Regardless of when it was acquired, prior to March 20th, of course?

"A. That is true.

"Q. And regardless of whether or not it was introduced at a public hearing?

"A. Yes, sir.

"Q. Did the Board rely upon evidence in designating the boundaries of this subdivision which was not introduced at the public hearing on January 10th?

"A. Yes, we relied on all of our office records, on the accumulation of the annual investigations for the preceding years.

"Q. Of preceding years?

"A. Yes.

"Q. And your investigations subsequent to January 10th; is that right?

"A. Yes.

"Q. And you had to rely upon the records, both pre- and post-January 10th in order to make your determination or designation of these boundaries; is that right?

"A. Yes, sir, that is true."

Again, Mr. Guleke testified as follows (R. 335):

"Q. You conceived that you could continue your studies independently of a public hearing and when you arrived at your conclusion, just announce your conclusion, is that right?

"A. Yes, sir.

"Q. And that is what you did on March 7th?

"A. Yes, sir.

"Q. And then later on March 20th, you entered a formal lengthy order, didn't you?

"A. Yes, sir.

"Q. You had no public meeting?

"A. No.

"Q. Where the various interests were present when the additional data was introduced and discussed?

"A. No.

"Q. And where an opportunity for cross-examina-

tion of witnesses was afforded those who were interested in the subject matter?

"A. No.

"Q. You didn't have any such meeting after January 10th?

"A. No."

As indicated, the State Board, without further hearing, passed a preliminary order on March 7, 1951, designating the entire County of Martin as an underground water reservoir subdivision (900 square miles) but three days later, on March 10, 1951, entered an order designating a narrow strip of approximately 70 square miles as the finally designated subdivision. Respondent Martin County District boundaries conform to the latter.

The evidence at the January 10, 1951 hearing did not support either designation. The evidence at the trial of this cause did not support either designation. Petitioners, to this date, do not know the extent of the *ex parte* investigation and evidence considered by the State Board in making its final designation.

I

Reasons for Granting Writ

Petitioners submit that the foregoing official records, acts and admissions of the Respondent Board of Water Engineers conclusively demonstrate that they were denied the full, fair and open hearing required by the due process clause of the Fourteenth Amendment and the hearing requirement of the State statute. In *B. & O. R. Co.* v. *U. S.*, 264 U. S. 257; 68 L. Ed. 667, 674, this court said:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action."

In *Railroad Com. of Cal.* v. *Pacific G. & E. Co.*, 302 U. S. 388, 82 L. Ed. 319, 322, this court further said:

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Teleph. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57 S. Ct. 724. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431, 433, 33 S. Ct. 185; *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38, 51, 73, 80 L. Ed. 1033, 1041, 1052, 56 S. Ct. 720; *Morgan* v. *U. S.*, 298 U. S. 468, 480, 481, 80 L. Ed. 1288, 1294, 1295, 56 S. Ct. 906; *Ohio Bell Teleph. Co.* v. *Public Utilities Commission*, 301 U. S. 392, 81 L. Ed. 1093, 57 S. Ct. 724, *supra*."

Nothing can be treated as evidence which is not introduced as such. *U. S.* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288, 68 L. Ed. 1016, 1022; *R. C. C.* v. *L. & N. R. Co.*, 227 U. S. 88, 91, 93, 57 L. Ed. 431, 433, 434, 33 S. Ct. 185, *supra*. "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *U. S.*, 304 U. S. 1, 18, 82 L. Ed. 1129, 1132. The latter decision holds that the rule applies equally to proceedings which are of an adversary character as well as those initiated as a general inquiry.

Many of the "fair hearing" cases are analyzed and discussed by Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U. S. 123, 165, 95 L. Ed. 817, 850 (Footnote).

These principles were ignored not only by the Board of Water Engineers but also by the Supreme Court of Texas.

The Court says in its opinion: "Although appellees shortly thereafter acquired information which they state they believe would make the designation erroneous, they never at any time submitted such information to the Board." This statement implies that Petitioners should have submitted additional information in some informal, *ex parte* and unilateral fashion. It overlooks the fact that the Board held no additional hearings at which Petitioners could present their additional evidence or hear, examine and rebut the additional evidence obtained by the Board.

Error in this respect is compounded by the Texas Court's holding that this case is governed by the "substantial evidence rule." Under this rule, the Board's order must be sustained if supported by substantial evidence—more than a scintilla but less than a preponderance or the great weight. Of the unknown "facts" relied upon by the Board in making its designation in this case, the ones it deemed controlling may have been false and rebuttable. Those which in the crucible of cross-examination and rebuttal might have been proved to be true might, nonetheless, have been deemed insufficient by the Board to justify the finding it made. A court has no way of knowing what credence or value the administrative board may have given to a mixture of true and false evidence heard only in chambers and unknown to the court or the parties. These consequences dictate that the requirement of full, fair and open hearings be applied rigorously to administrative and quasi-judicial orders which can be reviewed by the courts only under the substantial evidence rule.

At the conclusion of the hearing of January 10, 1951, before the State Board, an attorney for the Colorado District stated to the Board that if the hearing was to be kept open for further evidence, he desired to report the matter to the Board of Directors of the Colorado District to determine whether or not they felt that they were likely to be prejudiced by the proposed designation and requested an opportunity to be heard further (R. 688). Without

further advice to the Colorado District, the Board, after consultation with Judge James McMorries, representative of the applicants for designation, entered its order of March 7, 1951, and followed three days later with its order making the final designation (R. 334, 335). Petitioners were not informed of these private consultations or of the Board's intentions to enter an order without holding further public hearings.

II

Confiscation and Drainage

The failure of the State Board to designate, and the Martin County District to include within its boundaries, all of the common underground water reservoir permits the drainage and confiscation of Petitioners' water. Lands within the District are restricted as to the drilling of wells and the production of water. Lands outside the District but within the common reservoir are unrestricted.

The map designated as Plaintiffs' Exhibit No. 19, filed with the record in kind, tells the story. The underground reservoir extends well beyond the boundaries of the Martin County District.

At the time the Board designated the subdivision on March 20, 1951, there were approximately 124 wells used for irrigation or municipal supply (City of Stanton). Of these, 39 were left out of the designation and the Martin County District (R. 515, 519). The five municipal wells of the City of Stanton, County Seat of Martin County, were left out (R. 376). One large irrigation well left out of the District is within one hundred feet of the District boundary (R. 351). Some portions of two large ranches, the Dickinson and Houston Ranches, containing some of the most prolific portions of the reservoir, were left out of the District, whereas other portions having little or no water were included within it (R. 375).

Mr. W. L. Broadhurst, expert hydrologist for the Board of Water Engineers, testified, in substance, at the trial that:

(1) At the time of the designation of the Martin County Subdivision on March 20, 1951, he and the Board of Water Engineers had reason to believe that the underground water reservoir extended well beyond the designated area (R. 508, 525);

(2) The evidence upon which the Board based its designation was very meager (R. 507-8);

(3) The withdrawal of water from existing or future wells outside the boundaries of the District can and does measurably affect the water table within that portion of the reservoir within the District (R. 512-13);

(4) Neither he nor the Board of Water Engineers knew on March 20, 1951 the extent of the reservoir "by any means" (R. 516) but they did know that prolific portions of the Ogallala formation in Martin County, which were part of the common reservoir, were left out of the designated subdivision (R. 499, 508);

(5) He did not know that a subsequent alteration of the boundaries of the subdivision would *not* automatically result in the extension of the boundaries of the underground water conservation district (R. 524-5) and he did not know that there was no way to force adjoining lands subsequently added to the designation to become a part of the underground water conservation district;

(6) In designating the subdivision, neither he nor the Board of Water Engineers gave any thought to "the problem of the people outside the District draining water from within the District" (R. 524-5) or the consequences of placing some of the reservoir under control and leaving other adjacent portions uncontrolled (R. 525).

Mr. Guleke, the only member of the Board of Water Engineers who testified at the trial, testified in substance as follows:

(1) In making the designation, the Board was "looking primarily for the irrigation area" since the irrigators were "the persons who seek the benefits of this law" (R. 355);

(2) Instead of basing its decision on hydrologic and geologic conditions, the Board took into account the wishes of the irrigators (R. 359), the economics of producing and using water (R. 358), the present uses of the land, and attempted to anticipate what future land uses might be (R. 356-7, 386, 478, 490.);

(3) The Board did not have sufficient data "to determine just where water might be found" in other parts of Martin County and in adjoining counties (R. 387);

(4) Numerous calls of the metes and bounds description of the subdivision were fixed by drawing a straight line from one point to another because the Board had no information at hand showing subsurface water formation conditions in those areas (R. 364).

Respondents produced another expert hydrologist as a witness at the trial, Prof. P. Eldon Dennis, of Texas Technological College. He testified in substance that:

(1) He had studied all the data available to the Board of Water Engineers at the time of trial, and it was insufficient to fix the perimeter of the acquifer, particularly on the east side of the designation (R. 537, 542-6);

(2) He was of the opinion that the Board should have considered only hydrologic and geologic conditions and should have not considered prospective future land and water uses, economics and the desires of the local residents (R. 567);

(3) He considered himself fortunate that he had not been called on to find an underground water reservoir or subdivision thereof on the basis of the small amount of data which was available to the Board of Water Engineers in designating the Martin County subdivision (R. 571);

(4) If the development of water uses in Martin County continued for the next ten years as it had during the 1948-1952 period, substantially all of the recoverable water would be depleted by 1962 (R. 559, 609);

(5) He agreed with the Colorado District's expert hydrologist, Mr. Walter White, whom he described as the ablest hydrologist in Texas, that the acquifer extended outside the boundaries of the subdivision on the northerly and easterly sides (R. 547-8), and that the withdrawal of water from one side of the subdivision line in Martin County would measurably affect the water table on the opposite side (R. 537).

Because of these admissions by respondents' own witnesses, which stand unrefuted in the record, Petitioners deem it unnecessary to review the testimony of their own expert witnesses, except to point out that their witnesses amply supported the foregoing facts.

The judgment of the trial court made a specific finding of confiscation and drainage.

The right guaranteed by the equal protection clause of the Fourteenth Amendment is the right to equal treatment. *Hillsborough* v. *Cromwell,* 326 U. S. 620, 90 L. Ed. 358; *Lewisville Gas Co.* v. *Coleman,* 277 U. S. 32, 72 L. Ed. 770. It requires that the rights of all persons must rest upon the same rule under similar circumstances. In *Thompson* v. *Consolidated Gas U. Corp.,* 300 U. S. 55, 77, 81 L. Ed. 510, 522, this Court condemned an order of the Texas Railroad Commission because it discriminated against some of the owners of a common gas reservoir in favor of others, all of whom were under the common regulation. The Court said: "Our law reports present no more glaring instance of the taking of one man's property and giving it to another." If this be true of a mere difference in degree of regulation, it is much more true where some owners of a common reservoir are subjected to complete regulation, whereas other owners are regulated not at all.

The very requirement that Petitioners must obtain a permit from Respondent Martin County District in order to drill a well, whereas adjacent landowners across an imaginary line are free to drill wells as they please is, within itself, a denial of equal treatment. The further requirement that Petitioners must limit the rate of production of their wells, while neighboring landowners in the common reservoir are free to produce at any rate they choose is not only a denial of equal protection and treatment, but it constitutes a taking of Petitioners' property and giving it to their neighbors. *Harrison* v. *Danville & W. R. Co.*, 208 U. S. 598, 605, 606, 52 L. Ed. 637, 639, 640; *Rindge Co.* v. *L. A. Co.*, 262 U. S. 700, 705, 67 L. Ed. 1186, 1191. This is done not only without compensation, but for a private, rather than for a public, purpose. See *City Mill Co.* v. *Honolulu Sewer Com.*, 30 Hawaii 912 (1929).

III

Denial of Federal Rights by the Texas Court

The Supreme Court of Texas refused to pass upon the constitutional questions raised in Petitioners' pleadings (R. 1-18—Trial Amendment, R. 32) and in the Motion for Rehearing in the Supreme Court (R. 57-67). It dismissed the appeal on the grounds that Petitioners had delayed unduly in filing the suit.

This holding of the Texas Court is not binding upon the Supreme Court of the United States. In *Railroad Com. of Calif.* v. *Pacific G. & E. Co.*, 302 U. S. 388, 391; 82 L. Ed. 319, 321, this court said: Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal. *Silar* v. *Lewisville & N. R. Co.*, 213 U. S. 75, 191, 53 L. Ed. 753, 757, 29 S. Ct. 451; *Lewisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 303, 58 L. Ed. 229, 238, 34 S. Ct. 48; *United Fuel Gas*

Co. v. *Railroad Commission,* 278 U. S. 300, 307, 73 L. Ed. 390, 395, 49 S. Ct. 150."

The doctrine of *Erie R. Company* v. *Tompkins,* 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, has no application to cases arising under the Constitution of the United States. *Washington University* v. *Gorman,* 153 S. W. 2d 35 (Mo. Sup. Ct.) citing *Jefferson Bank* v. *Skelly,* 1 Black 436, 17 L. Ed. 173, 177. In reviewing a decision of a state court involving a claim that petitioner has been denied due process of law or the equal protection of the laws, this Court is free to decide local questions of law essential to the determination of whether a federal right exists and has been denied. *Chesebro* v. *L. A. Co. Flood Control District,* 59 S. Ct. 622, 306 U. S. 459, 83 L. Ed. 921; *Lisenba* v. *California,* 62 S. Ct. 280, 314 U. S. 219, 86 L. Ed. 166, 172, 181 (Point 14); *Pierre* v. *Louisiana,* 59 S. Ct. 536, 306 U. S. 354, 83 L. Ed. 757 (Point 2); *Quaker City Cab Co.* v. *Penn.,* 277 U. S. 389, 72 L. Ed. 927; *Young* v. *Ragen,* 337 U. S. 235, 93 L. Ed. 1333, 1336.

More specifically, this court has held it is not bound by decisions of state courts in equity proceedings where questions of limitations or laches are at issue. *Russell* v. *Todd,* 60 S. Ct. 527, 309 U. S. 280, 84 L. Ed. 754, 761 (Point 5); *Southern P. Co.* v. *Bogert,* 39 S. Ct. 533, 250 U. S. 483, 63 L. Ed. 1099. In such cases, the federal courts will generally follow state statutes relating to questions of limitations or laches but are not bound to do so.

Section F of Article 7880-3c, Vernon's Texas Civil Statutes, specifically authorizes suits by interested parties "who may be dissatisfied therewith" to test the validity of any order or act of the Board of Water Engineers entered or done under authority of this statute. No time limit on the filing of such suits is fixed by the statute.

Article 5529, Revised Civil Statutes of Texas, 1925, provides that: "Every action other than for the recovery of real estate, for which no limitation is otherwise pre-

scribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward." This suit was brought within seven months after entry of the order of the Board of Water Engineers complained of, and three years and five months before the end of the limitation period.

The order of the Board of Water Engineers designating the underground water reservoir subdivision, standing alone, was meaningless and damaged no one. It was the first of a series of steps all of which must have happened before Petitioners could have been damaged, viz.: the filing of a petition with the Commissioners Court of Martin County signed by fifty or a majority of the landowners within the designated area praying for the creation of an underground water conservation district; notice and public hearing and a determination by the County Commissioners Court of Martin County that the petition should be granted; the actual creation of the conservation district; the confirmation of the creation of the district by a majority vote of the qualified voters at an election held within the district; and the adoption of rules and regulations by the Board of Directors of the district injurious to Petitioners' rights (Article 7880-10/29; 3c).

Until the last of these events had occurred, Petitioners could have shown no damage, or threatened damage, which would have given them standing in court. Their "dissatisfaction", referred to in the statute, did not ripen until the last of these events occurred. What if a majority of the landowners within the district failed to sign the petition, or the Commissioners Court refused to grant the petition and create the district, or a majority of the qualified voters voted against confirming the creation of the district, or the rules and regulations adopted by the district were not offensive to Petitioners' rights? Petitioners' suit would have been dismissed or abated until these uncertainties had been removed.

"Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. *Arizona* v. *California*, 283, U. S. 423, 462, 75 L. Ed. 1154, 1169, 51 S. Ct. 522." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325, 80 L. Ed. 688, 699. Until an actual "controversy" exists with damages inflicted or threatened, the judicial processes cannot be instituted. "Courts do not decide cases on what may happen in the future, but upon the present conditions, as demonstrated by the facts in a given case." *Town of Refugio* v. *Streuch*, 29 S. W. 2d 1041, 1044 (Tex. Comm. App.—1930); *Munger* v. *Richards*, 87 S. W. 2d 797 (Tex. Civ. App.—Err. Ref.).

At the time the Supreme Court of Texas held that Petitioners should have filed their suit, Petitioners had not been damaged and their potential future damages were so fraught with uncertainties dependent upon the future exercise of human discretion and choice that no actual controversy existed.

Conclusion

Unless set aside, the judgment of the Supreme Court of Texas forever bars an attack by Petitioners upon the erroneous order of the Board of Water Engineers. By the very nature of the holding, attacks by other landowners are likewise forever barred.

The crux of the Board's error was its failure to include all of the reservoir within the designation. Unless relief is granted by this Court in this proceedings, that error is forever encased in a protective wall of judicial immunity.

To the forty-eight thousand citizens of Big Spring and Odessa, with their established homes and businesses and economy, this supply of water is a matter of utmost importance. It is far more valuable to them than a like quantity of oil or gas.

The Colorado District, the cities of Big Spring and Odessa, and the individual landowners who are petitioners have been denied substantial federal rights, both procedural and substantive. It is accordingly urged that a Writ of Certiorari to review the judgment of the Supreme Court of Texas should be granted.

Respectfully submitted,

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Office - Supreme Court, U.S.
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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 79

COLORADO RIVER MUNICIPAL WATER DISTRICT, ET AL.,

Petitioners,

vs.

BOARD OF WATER ENGINEERS OF TEXAS, ET AL.,

On Petition for Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR RESPONDENTS IN OPPOSITION

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August 18, 1953

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The trial court's judgment (without opinion) is set out, R. 34-36. The case was directly appealed to the Texas Supreme Court. Its opinion and the dissenting opinion (R. 44-57), not yet officially reported, are set out in 254 SW 2d 369-376. The dissent is on a question of Texas appellate procedure not here involved.

Jurisdiction

This Court does not have, or should not exercise, jurisdiction herein for these reasons:

1. The decision of the State court rests on non-federal grounds which independently and adequately support its judgment.

2. No substantial federal question is presented.

3. There is no specification of error attacking the holding of the Texas Supreme Court as denying Petitioners any federal right or attacking the validity of the procedural statute on which its opinion and judgment are founded.

An argument supporting these jurisdictional points is made below under the heading "Argument on Jurisdiction and Reasons Why Certiorari Should Be Denied."

Questions Presented

1. Has this Court jurisdiction?

2. Does the holding of the Texas Supreme Court deprive Petitioners of a federal right?

3. Assuming a federal question, does the action of the Texas Board of Water Engineers in simply ascertaining and determining the boundaries of a subdivision of an underground water reservoir, a portion of which underlies Petitioner's land, deprive Petitioners of any federal right?

Statute

Article 7880-3c of Vernon's Texas Civil Statutes[1] was construed by the Texas Supreme Court. (R. 48.) Petitioners omit from their quotation of the statute (by the use of asterisks) the procedural part of the statute on which the Texas Supreme Court's decision is based. (Petition, page 4.) This omitted portion is quoted in the Texas Supreme Court's opinion, R. 48.

Statement of the Case

The nature of the case is correctly set out in the opinion of the Texas Supreme Court. (R. 44-50.) By Article 7880-3c, the Texas Legislature authorized the formation of underground water conservation districts. It was made the duty of the Board, from time to time and upon petition, to designate underground water reservoirs and subdivisions thereof and to thereafter alter the boundaries thereof as conditions require and factual data may justify.

The statute contemplates that after the designation of a subdivision, citizens may, after an election held for that purpose, form a political subdivision over the boundaries of a designated reservoir or subdivision. Such district is authorized to promulgate conservation rules and to support itself by taxation.

Only the first step, the ascertaining and description of the boundaries of the subdivision by the Board, was before the Texas courts.

The State Board of Water Engineers and the U. S. Geological Survey, which office together and share

[1] Ch. 306, Acts 51st Leg. (1949), p. 559.

expenses, have a rich backlog of information on the Martin County wells extending back 16 years. (R. 468, 306.) It nevertheless called a hearing, after notice, to receive testimony on the boundaries of the water reservoir and subdivision. Petitioners attended the hearing but offered no evidence, took no position, and made no exceptions. They did nothing. (R. 371.) Thereafter, as the Texas Supreme Court's opinion reflects, Petitioners sat by while an election was ordered and held in Martin County to decide whether a district should be formed, while the district was formed, directors named, and rules and regulations promulgated by the district. Only after these district rules, which are not before the Court, were promulgated, some seven months later, did Petitioners seek to avail themselves of the statutory privilege of filing suit in the district court of Travis County, Texas, to challenge the validity of the Board's order.

After trial, the district court adjudged that the Board's order was invalid because not supported by substantial evidence, and that in consequence the Martin County District does not validly exist, and its rules and regulations are void. The court, on those grounds, enjoined enforcement of such rules and regulations, and enjoined the district and its directors from interfering with Petitioners' activities.

On direct appeal, the Supreme Court of Texas, declining to decide the merits of the Board's action, held that the district court suit challenging the validity of the Board's order was not brought within a reasonable time, and that for that reason, Petitioners had forfeited the statutory right of appeal to the district court. Said the Texas Supreme Court:

"The purpose of our conservation statutes can not be effectuated if litigants are permitted to delay attacks upon orders of the Board for seven months, during which time conservation districts have been organized agreeably with the order, confirmed by the voters, directors elected, and rules promulgated." (R. 49; 254 S. W. 2d at 373.)

Concluding, the Court said:

"This opinion should not be construed as holding by implication that the Board's order was not reasonably supported by substantial evidence, and that had appellees filed their suit in time they would have obtained the relief sought. For obvious reasons that question has not been discussed in this opinion.

"The judgment of the trial court and the injunction are set aside, and the case is dismissed." (R. 50.)

Thus the Supreme Court of Texas has based its judgment of dismissal upon two explicit rulings: First, the Court has construed the Texas statute to mean that the right of appeal from the Board's order was lost if the suit was not filed within a reasonable time; and second, in the circumstances, a delay of seven months was unreasonable.

Neither of these rulings is challenged by Petitioners on Federal grounds. Nor is the Texas statute, as construed and applied by the Supreme Court of Texas, assailed on Federal grounds.

Indeed, although the Petition seeks review of the final judgment of the Supreme Court of Texas, that Court's action has not been challenged by specification of error on either Federal or local ground.

Argument on Jurisdiction and Reasons for Denying Certiorari

1. The decision of the State court rests on non-federal grounds which independently and adequately support the State court's judgment. This Court therefore should decline to take jurisdiction. *New York City v. Central Savings Bank*, 306 US 661; *Washington v. Inland Empire Ref. Co.*, 311 US 713, and other cases cited in the note below.[2]

As the opinion of the Texas Supreme Court shows (R. 47-50), the case was decided on the single ground that Petitioners failed to appeal in time to the district court of Travis County after the entry of the order by the Board. It rests entirely on an interpretation of the procedural portions of the Texas statute (Sec. F, Art. 7880-3c) by the Texas Supreme Court. No claim is made that the statute does not afford due process. Petitioners did not charge in their motion for rehearing in the Texas Supreme Court (R. 57-67) that its failure to decide the merits of their case deprived them of any federal right or that the Court's action was based on evasion or pretext to avoid the federal question.

The holding is also adequate. As the opinion reflects (R. 48), the statute was interpreted to require those dissatisfied with an order of the Board to appeal to the Court within a reasonable time. In view of all the circumstances (R. 48, 49), the Court held

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[2] *S. W. Bell Tel. Co. v. Oklahoma*, 303 US 206 at 212; *Herb v. Pitcairn*, 324 US 117 at 125; *Fox Film Corp. v. Muller*, 296 US 207; *Lynch v. New York*, 293 US 52; *Buck v. California*, 343 US 99 at 103.

that a delay of seven months was an unreasonable one.[3] The holding completely disposes of the case without touching or disturbing any federal question.

While the Texas Supreme Court's decision is one of statutory construction rather than laches, unreasonable delay is involved. This Court has repeatedly held that where a State's highest court has held that a party is barred by laches, the holding is based on adequate non-federal grounds, and "our jurisdiction therefore fails." *Utley v. St. Petersburg*, 292 US 106 at 111; *Moran v. Horsky*, 178 US 205. The two cases cited by Petitioners on page 21 (*Russell v. Todd* and *Southern P. v. Bogert*) do not hold differently. Those cases originated in the federal district court, and the decisions discuss the general equity powers of federal courts as an original proposition. This court held in *John v. Paullin*, 231 US 583 at 585:

"Without doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction."

2. *No substantial federal question is presented.* Even assuming that this Court will go behind the disposition of this cause by the Texas Supreme court on the non-federal ground, no substantial federal question is presented. Appeals to the state courts from the Board of Water Engineers are like those in

[3] The statute prescribes that "such suits shall be advanced for trial and be determined as expeditiously as possible, and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the court." Sec. F, Art. 7880-3c.

appeals from the Railroad Commission of Texas.[4] The complaining party is entitled to a trial *de novo* in the district court under the substantial evidence rule. (R. 46-47.) Evidence must be introduced *in Court* to support the Board's order. The order of the Board is tried anew in the Court. Under Texas practice, the question is not what was introduced before the Board, but whether there is substantial evidence, introduced in Court, to support the Board's order. The Texas Supreme Court did not find it necessary to pass on that point here.[5] But as to due process, the Texas procedure has been before this Court on several occasions and upheld. Mr. Justice Black wrote for the Court in *Burford v. Sun Oil Co.*, "The judicial review of the Commission's decisions in the state courts is expeditious and adequate."[6]

Petitioners' real complaint is against the rules and regulations of the Martin County District promulgated by that district (not the Board of Water En-

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[4] See the Railroad Commission cases cited by Texas Supreme Court. R. 47. The statute here provides that on appeal the order shall be deemed prima facie valid "but the trial shall be *de novo*, and the court shall determine independently all issues of fact and law." *Ibid*, note 2.

[5] It stated: "This opinion should not be construed as holding by implication that the Board's order was not reasonably supported by substantial evidence. . . . For obvious reasons that question has not been discussed in this opinion." (R. 50.)

[6] 319 US at 334 (1943). The Texas decisions that the test is not what is introduced before the Commission but what is introduced before the Court are reviewed by Mr. Justice Frankfurter in his dissenting opinion in that case. 319 US 340, 341. He dissented not on the ground of want of due process but from the holding that these cases should be first presented to the state courts before the federal courts would take jurisdiction under *Railroad Commission v. Pullman Co.*, 312 US 496.

gineers) subsequent to the actions of the Board here challenged by Petitioners. *Those rules and regulations are not before the Court.* That feature of the case was severed in the trial court. (R. 28, 29.) So whether Petitioners' property will be taken because of such rules is not here. No question, federal or otherwise, about proration of water or production allowables is before the Court.[7]

Petitioner's claim of drainage is speculative and premature. The mere definition of the boundaries of a subdivision of an underground reservoir by the Board could not take Petitioner's property or cause drainage. Moreover, there is *no* evidence that they are being drained from outside the district.[8]

A map of the designated subdivision is attached in the back hereof. A detailed legend accompanies it. The district is the white portion in the center. The numbered squares are sections (square miles) of land. The yellow circles represent producing irrigation wells. The red circles represent dry, abandoned, or unused wells. Grazing and ranch lands outside the district are shown in light green; dry farming land is a darker green. The hatched area represents the Dickinson ranch which was voluntarily taken into the district during trial to answer the contention that there might be drainage from it. (R. 245, 627.)

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[7] The Texas Constitution provides that the conservation and development of the State's natural resources, including water, are "declared to be public rights and duties," and that the Legislature shall pass all laws appropriate thereto (Art. XVI, Sec. 59a). Clearly, therefore, the production of underground water is subject to regulation. Whether the Martin County rules will be reasonable is *not* before the Court.

[8] Their hydrologist admitted that he had no data or absolute measurement and that "no one else has." (R. 176.)

A glance at the map shows that the great majority of the irrigation wells were included within the subdivision, while the area outside is ranching or dry farming land marked by many dry, abandoned, or unused wells. The absence of large wells outside the district in the same formation shows the extreme remoteness of actual drainage of Petitioners' land shown in red.

Petitioners actually complain of *potential* drainage under regulations not before the Court. Mr. Justice Frankfurter wrote for the Court in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.* that any attempt to pass on the fact of sub-surface drainage touched matters of geography, geology, physics, and engineering, and would "take us into that debatable territory which is not the province of federal courts to enter. * * * Plainly these are not issues for our arbitrament." 310 US 573 at 583.

Moreover, Petitioners are not in a position to complain of lack of due process before the Board. They did not appear before the Board as adversaries. (R. 101.)[9] They offered no evidence (R. 277, 370, 101, 102), made no objections, protests, exceptions, or motions. (R. 279.) They ignored the Board's written

[9] Petitioners' engineer, who was at the hearing for Petitioner, testified: ". . . the district [Petitioner] was not in any way opposed to the formation of the district. . . ." (R. 101, 116.) "We were not particularly interested in the district at that time. . . ." (R. 116.) "We didn't go back to the Board of Water Engineers for an enlargement because they didn't forsee the type of rules the Martin County District would impose." "Up to that time, most everybody was hopeful they would think that it was a fine institution." (R. 124.)

request for additional information on the boundaries of the district. (R. 279.) They did nothing. (R. 374.)

Owning only 10% of the land within the bounds of the designated subdivision, they freely admitted that they plan to take more than 10% of the water. (R. 112, 113.)[10]

Conclusion

Respondents are so completely convinced that the petition for certiorari should be denied for the reasons above set out that they do not deem it proper or necessary to take the Court's time to review the merits of the controversy.

What this Court must review is the action of the Texas Supreme Court. It does not sit to review the actions of the Board of Water Engineers. The petition for certiorari has not one assignment or specification attacking the action of the Texas Supreme Court. It nowhere attacks the constitutional validity of the procedural statute under which the Texas Supreme Court acted.

The opinion of the Texas Supreme Court does not

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[10] Petitioners own or have a lease on 4600 of the 46,700 acres in the district, roughly 10% (R. 112). Estimates vary as to the amount of recoverable water. But in Petitioners' bond prospectus, it stated that it planned to deliver in 10 years 28.5 billion of the 43.8 billion gallons available (R. 108). That is, owning 10% of the land, it contracted to extract and deliver 65% of the recoverable water. Their engineer testified that the field would be substantially depleted in 10 years. (R. 108, 109). Even with the Martin County rules, Petitioners can still get all the water they need (R. 111). They simply must comply with its conservation rules by drilling more wells instead of pumping a half a million to a million gallons per well per day from a few wells. (R. 111, 81.)

conflict with any other opinions. In the main, this is a suit between two Texas state agencies decided on Texas procedure. It involves only the boundaries of one underground water subdivision within the State of Texas. Moreover, it is made the duty of the Texas Board of Water Engineers, by the same statute here involved, to alter the boundaries of the district "as future conditions may require and factual data justify."

It is submitted that this petition for writ of certiorari should be denied.

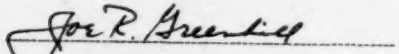
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